

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARLON PENDLETON,

Plaintiff,

vs.

PAMELA FISH, et al.,

Defendants.

) Docket No. 07 C 6648

) Chicago, Illinois
) December 18, 2009
) 12:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS - STATUS
BEFORE THE HONORABLE JAMES B. ZAGEL

APPEARANCES:

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4 Pamela Fish:

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8 For Defendants
9 Steven Barnes,
10 Jack Stewart and
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12:01:14 1 (The following proceedings were had in open court:)

12:01:14 2 THE CLERK: 2007 C 6648, Pendleton v. Fish et al.

12:01:45 3 MR. BOWMAN: Good day, Judge; Locke Bowman on behalf
12:01:51 4 of plaintiff.

12:01:52 5 MS. PARLING: Good morning, your Honor; Brittany
12:01:54 6 Parling on behalf of the plaintiff.

12:01:55 7 MR. MORRIS: Gareth Morris also on behalf of the
12:01:57 8 plaintiff; good afternoon, Judge.

12:01:58 9 MR. TIMBO: Good afternoon, your Honor; John Timbo on
12:02:00 10 behalf of defendants Steven Barnes and Jack Stewart and the
12:02:03 11 City of Chicago.

12:02:03 12 MR. KULWIN: Good afternoon, Judge; Jeffrey Kulwin
12:02:07 13 K-u-l-w-i-n, on behalf of defendant Pam Fish.

12:02:09 14 THE COURT: Does somebody actually have the full text
12:02:19 15 of the Fish report that is quoted in part here?

12:02:26 16 MR. BOWMAN: Yes.

12:02:27 17 MS. PARLING: Yes.

12:02:28 18 THE COURT: If you do, a quick look.

12:02:33 19 MR. BOWMAN: I am going to hand you --

12:02:36 20 THE COURT: I am interested in the portion that was
12:02:38 21 quoted in part.

12:02:39 22 MR. BOWMAN: Right.

12:03:29 23 THE COURT: Okay. Thanks.

12:04:02 24 Let me tell you what my impression is having read the
12:04:05 25 two documents. The first is that some of the discovery you

12:04:14 1 want, and maybe significant portions of it, I am likely to
12:04:19 2 give you. And there's some objections that have been made on
12:04:26 3 behalf of the defendant Fish that I don't regard as
12:04:31 4 significant in and of themselves. To the extent that evidence
12:04:40 5 with respect to cases that others or you have filed that did
12:04:50 6 not result in judgment or even suit against Fish, I don't
12:04:56 7 think that takes them off the field for discovery. It's
12:05:03 8 perfectly possible that a series of lawsuits on an issue might
12:05:09 9 fail, and then the last suit might succeed, or the most recent
12:05:14 10 suit might succeed, because there's a difference in the
12:05:17 11 cumulative weight of evidence. And sometimes in the facts.
12:05:22 12 So that, I am not concerned with.

12:05:29 13 What concerns me is the what I regard as a fairly
12:05:38 14 narrow base on which liability is founded here, and the reason
12:05:42 15 it's a narrow base is not -- it's not the kind of case in
12:05:48 16 which you have direct tampering of evidence, nor is it the
12:05:57 17 kind of case in which the analysis made by the criminalist so
12:06:03 18 far as it went is necessarily wrong.

12:06:09 19 As I understand the gravity of the case is that a
12:06:14 20 report was filed yielding the results -- presumably accurate
12:06:22 21 results of whatever it was that test that Fish performed. And
12:06:30 22 then the issue becomes there were other tests either that she
12:06:36 23 could have performed or that were performed later and they
12:06:40 24 weren't performed, and as a result of their not being
12:06:46 25 performed, you had an individual exonerated by the results of

12:06:50 1 the test who spent more time in custody, significantly more
12:06:57 2 time in custody, than he would otherwise have spent.

12:07:04 3 For purposes of the hearing today, I'm assuming that
12:07:16 4 there was nothing that would give rise to civil liability in
12:07:21 5 what Fish did at the time she did it and that whatever
12:07:27 6 liability there is is a result of the report she filed and the
12:07:35 7 consequences of the report that she filed. As I understand it
12:07:40 8 -- and feel free to correct me, because I am rephrasing my
12:07:43 9 understanding -- where her fault lies is she prepared a report
12:07:48 10 which led subsequent lawyers, presumably faced with a client
12:07:55 11 who was adamant in asserting his innocence, left their client
12:08:02 12 who really, for all practical purposes, the only request was a
12:08:09 13 DNA test.

12:08:11 14 And I presume -- I am also assuming that the other
12:08:16 15 evidence in the case against him wasn't that weak. They could
12:08:23 16 be wrong for a variety of reasons, but it was the kind of case
12:08:26 17 where one and several courts could say, well, yes, it's an
12:08:31 18 appropriate conviction, there's enough evidence, so on and so
12:08:34 19 forth. So we are talking about a situation which has arisen
12:08:39 20 lately where there is on the record enough evidence, it turns
12:08:42 21 out that the evidence is wrong, and we know it's wrong because
12:08:46 22 of the DNA.

12:08:50 23 So the process goes along. You have an adamant
12:08:54 24 defendant who says I didn't do it, and the answer to that
12:08:57 25 usually is, well, let's take a look at the DNA with this kind

12:09:00 1 of offense. But nobody looked at the DNA and nobody tried to
12:09:04 2 look at the DNA because they had a report which they
12:09:09 3 interpreted to mean there isn't enough to test.

12:09:15 4 And you want to know if that report was the kind of
12:09:22 5 thing that you could persuasively argue was not done as a
12:09:27 6 result of an honest error, or even an error that wasn't so
12:09:32 7 honest, that was just careless. So you want to know if this
12:09:38 8 happened before.

12:09:42 9 And as I understand Fish's objections, apart from
12:09:48 10 some that I am not giving any weight to, part of the objection
12:09:54 11 is that you may want to look at other instances in which you
12:10:02 12 believe you might be able to prove that Fish did the wrong
12:10:07 13 thing but the wrong thing in question was not filing a report
12:10:12 14 like this, it was something else. And for that reason, I
12:10:21 15 think his position is, you know, maybe she did some other bad
12:10:25 16 things. But the only thing you're going to be able to get in,
12:10:30 17 the only thing that could possibly help you, is if she wrote
12:10:34 18 reports of this kind that could or would likely be
12:10:45 19 misinterpreted to mean there was nothing left to test and as a
12:10:48 20 result of which may be others.

12:10:50 21 And then, of course, you've got all kinds of other
12:10:53 22 things about whether she would do this deliberately or whether
12:10:57 23 all of the others were honest mistakes too.

12:11:00 24 The first question that was raised in my mind is, I
12:11:08 25 don't really understand whose evidence this is because my

12:11:16 1 assumption would be that one of Fish's defenses would not
12:11:23 2 merely be that I might have been careless in preparing this
12:11:30 3 report, but you will notice I never destroyed anything, and on
12:11:37 4 top of that, this was the customary report I wrote, and I have
12:11:43 5 done 10,000 analyses, which I think must be an overstatement
12:11:48 6 using this hypothetical, and a small handful of them have been
12:11:53 7 challenged.

12:11:56 8 When I am taking a look at this, I am wondering if
12:12:00 9 maybe this is the kind of some of the stuff, the broad
12:12:05 10 comprehensive thing you want is essentially also material for
12:12:09 11 the defense. And when I was reading this, I am wondering why
12:12:17 12 we're exactly at odds over this because, ordinarily, a
12:12:21 13 criminalist in this position will testify, I have done
12:12:27 14 thousands of analyses, and I am only human, but look at the
12:12:32 15 999 that I got right, and here's one I got wrong, and I'm
12:12:37 16 really sorry about it, but I didn't do it deliberately. So
12:12:42 17 both of you can comment on the issue of whose evidence this
12:12:46 18 is.

12:12:48 19 MR. BOWMAN: Well --

12:12:49 20 THE COURT: Meaning which side would want -- I am not
12:12:53 21 talking this in the classic possessive term. That which one
12:12:57 22 would want to introduce.

12:12:59 23 MR. BOWMAN: I will tell you that the thought has
12:13:03 24 occurred to us -- the thought you just expressed has occurred
12:13:06 25 to us as well, and, indeed, I don't think that as we all stand

12:13:16 1 here now, anybody can confidently answer your query because we
12:13:22 2 don't know the information, and that's one of our fundamental
12:13:29 3 points, that, you know, I suppose there may be things that we
12:13:36 4 develop through this line of discovery that could be argued to
12:13:41 5 hurt us, there may be things that we develop that we can argue
12:13:49 6 support the drawing of an inference as to mental state along
12:13:54 7 the lines that you suggested but as we stand here now, we're
12:14:02 8 very interested to see.

12:14:05 9 And what we're particularly interested in is that
12:14:11 10 subset of cases in which the finding was made either initially
12:14:14 11 or in the ultimate report that was prepared with respect to
12:14:19 12 the analysis that it was an inconclusive DNA test, and those
12:14:25 13 are the ones that we want to carefully scrutinize. And I am
12:14:31 14 sure there aren't 10,000 of those, and I really have no idea
12:14:37 15 how many there are, but I wouldn't be astonished to learn that
12:14:42 16 it's a fairly small universe. Pam Fish did these kinds of
12:14:48 17 examinations, as we understand it, not having taken her
12:14:53 18 deposition yet, but our understanding is that this kind of
12:14:55 19 analysis came on line around the time of Pendleton's case, she
12:15:00 20 left the city four years later -- or three years later in
12:15:06 21 1997, and she stopped doing casework with the Illinois State
12:15:10 22 Police in 1999. So it's a fairly short time frame. How many
12:15:16 23 were inconclusive in that time frame that she authored the
12:15:21 24 report, I don't know. What inferences could be drawn to
12:15:25 25 plaintiff's benefit, potentially even to Fish's benefit from

12:15:28 1 that, we don't know. And the bottom line, as we stand here
12:15:34 2 now, seems to be that there is an articulable theory and you
12:15:44 3 have articulated it as to how this discovery could lead to
12:15:44 4 admissible evidence.

12:15:50 5 THE COURT: Mr. Kulwin.

12:15:50 6 MR. KULWIN: I guess I have a couple responses,
12:15:54 7 Judge. My brief basically responded to the theories that they
12:15:57 8 put in their brief, kind of none of which are being
12:16:04 9 articulated now. I responded to those things, and I've stated
12:16:09 10 why I don't think it's relevant there.

12:16:10 11 On the next aspect of what Mr. Bowman says, you know,
12:16:14 12 a relatively limited amount. If he wants to -- he's going to
12:16:19 13 want to focus in, just let's look at -- first, let's search
12:16:24 14 seven years' of records. Because the fact that she left the
12:16:27 15 City in '94 only because the City became the Illinois State
12:16:30 16 Police, for all intents and purposes, so that's a seven-year
12:16:34 17 period, and they want to look at all of the cases that she
12:16:37 18 wrote a report on. That's the first thing you have to do,
12:16:40 19 your Honor, you have to pull every file that she wrote for
12:16:43 20 seven years. Then you're going to have to ascertain how many
12:16:46 21 of them are inconclusive. Then you're going to have to
12:16:49 22 ascertain what happened in the case.

12:16:54 23 THE COURT: I actually have a fairly good idea of
12:16:57 24 what they would have to do.

12:16:59 25 MR. KULWIN: Okay.

12:16:59 1 THE COURT: And I also have a fairly good idea what
12:17:02 2 those files look like.

12:17:03 3 MR. KULWIN: I recognize that you would.

12:17:05 4 THE COURT: And I always thought that the integration
12:17:09 5 or the gradual disappearance of the Chicago crime laboratory
12:17:14 6 was inevitable the day that they built Maywood and opened it
12:17:18 7 for the State Police. I just thought that's what was going to
12:17:22 8 happen, and it did happen.

12:17:24 9 MR. KULWIN: So then I'm not -- as the defendant, I
12:17:27 10 agree with you. I am not going to say, well, gee, that's just
12:17:31 11 where it's limited to, these inconclusive reports, because to
12:17:34 12 me, the argument that you have put forth and what I set forth
12:17:36 13 in my brief is exactly right, let us look at her entire body
12:17:40 14 of work, everything. And then let us do a statistical
12:17:44 15 analysis to see if there was any statistically material result
12:17:49 16 that came. If she did 700 examinations and nine came out
12:17:58 17 erroneously in the manner in which they say, is that relevant?
12:18:02 18 If it is, then obviously 692 are relevant as well.

12:18:07 19 And so I don't think you can limit it to, well, let's
12:18:10 20 just look at the few that there was inconclusive because it's
12:18:14 21 unfair. I mean, the only way --

12:18:16 22 THE COURT: Yeah, bear in mind, my first thought, and
12:18:22 23 it's still my thought, is that some of this discovery could be
12:18:25 24 phased, but it was quite clear to me that there was no way
12:18:34 25 from the point of view of either side here that this issue

12:18:38 1 could be resolved or that the case could actually be fairly
12:18:43 2 tried unless everybody looked at a lot of paper. I was trying
12:18:49 3 to think of a way to avoid that, and I can't.

12:18:54 4 MR. KULWIN: And may I just supplement on that,
12:18:56 5 Judge. And I don't think we should even take that step. And
12:19:00 6 here is why. It might be laudable to do an audit of Pam
12:19:07 7 Fish's work. Maybe that's a laudable goal. I don't know.

12:19:10 8 But there are legislatures and executives and law
12:19:15 9 enforcement agencies and maybe independent citizens' groups
12:19:19 10 who -- and newspaper outlets who could have and very well may
12:19:23 11 have lobbied for that effort when she lost her position, when
12:19:29 12 all of this was in the papers, but I don't think that in the
12:19:32 13 context of a civil lawsuit we should be doing that. It's a
12:19:36 14 fishing expedition. It's nothing more than that. They don't
12:19:40 15 have anything.

12:19:41 16 The reality of it is they attempted to articulate why
12:19:46 17 they wanted this evidence in their brief, and I summarized it,
12:19:51 18 and I don't see any admissible basis. How do they do it?
12:19:55 19 What's it admissible for? Okay. Is it admissible -- one of
12:20:01 20 their theories was, well, she did it depending on who made the
12:20:05 21 request. So if it's an inconclusive report and the state made
12:20:11 22 the request, well, we are not going to use that one. If the
12:20:14 23 defense made the request and it turned out to be the fellow,
12:20:16 24 we are going to use that one.

12:20:18 25 Well, how do we know if the defense made the request?

12:20:21 1 I will tell you in this case, nobody knows who made the
12:20:23 2 request anymore. They have answered and said the police and
12:20:26 3 the state's attorney. In their answers to interrogatories,
12:20:30 4 they have said the same. I know, basically -- I think
12:20:33 5 Mr. Timbo can confirm -- that neither defense attorney or the
12:20:38 6 state's attorney who was involved in the case has any
12:20:41 7 recollection one way or the other.

12:20:42 8 So let's assume that it was inconclusive. For all
12:20:45 9 Pam Fish knows, in this case, in this record, it was a
12:20:50 10 supplemental follow-up request from the state's attorney. So
12:20:52 11 how do we do that in that situation? We don't just look at
12:20:56 12 the paper, Judge. We have to talk to the people involved.

12:20:59 13 Their second theory is, literally their second
12:21:03 14 theory, she was in a conspiracy with other people in the lab.
12:21:07 15 They would somehow talk to the police, find out if it was a
12:21:11 16 thin case or a strong case, if it was a thin case, they would
12:21:14 17 determine somehow this is the guy. If it was a strong case,
12:21:19 18 maybe they could say it's inconclusive. That's their
12:21:22 19 secondary.

12:21:23 20 Their third theory and fourth theories are basically
12:21:28 21 propensity. They want to show that she has done this in the
12:21:32 22 past. That's propensity. My concern is, Judge, unless you
12:21:35 23 have a lengthy review of all of her files and then you have a
12:21:38 24 forensic person who is going to look at all of them -- and I
12:21:41 25 can tell you that is going to be a huge cost, not that I have

12:21:45 1 to pay for it, but someone is going to have to pay for it --
12:21:48 2 and then you are going to have to do this other analysis and
12:21:51 3 you are going to have to have a statistical analysis, because,
12:21:54 4 otherwise, it is unfair.

12:21:56 5 It would be one thing if they could point to
12:21:59 6 something other than in this case where they said, here is a
12:22:01 7 case where -- here's four other cases, Judge, where she was
12:22:05 8 asked and there was DNA and people asked her, can we test it,
12:22:09 9 and she said there's not enough to test. There's nothing like
12:22:13 10 that.

12:22:13 11 And I will point out, Judge, and I brought it here, I
12:22:17 12 have sat through four depositions with Ms. Fish, including one
12:22:20 13 by Barry Scheck, the ultimate DNA expert. I have listened to
12:22:25 14 this for three years now. And I haven't even sat on all the
12:22:30 15 evidence. Two days at Jenner & Block in one case, going over
12:22:34 16 every detail, the way she did things and all the other things,
12:22:38 17 and by a hoard of lawyers. And the reality is it's a fishing
12:22:44 18 expedition because they start with the premise people were
12:22:47 19 wrongly imprisoned because she got it wrong; therefore, she
12:22:50 20 must have always done it, not just that she erred, not just
12:22:57 21 that she was incompetent, not because of a variety of things
12:23:01 22 done, et cetera, et cetera, and that's not in this instance.

12:23:04 23 So I don't mean to go on and on, Judge, and get
12:23:06 24 beyond your point, but I don't see how we do this without not
12:23:11 25 only looking at a tremendous amount of paper but have it

12:23:16 1 rigorously analyzed by a variety of experts, then have
12:23:21 2 reports, then have expert testimony, all in the context of
12:23:25 3 basically what is being proposed is an audit of Ms. Fish's
12:23:28 4 work. Let's audit her work and see how it comes out. Great.
12:23:32 5 That may be laudable, but not in the context of a civil
12:23:35 6 lawsuit. Not here.

12:23:38 7 MR. BOWMAN: Judge, it's really not our intention to
12:23:44 8 audit Pam Fish's work. We're not interested in doing any
12:23:49 9 retesting of anything. Our review is going to be limited to
12:23:55 10 the manner in which results were presented, and the question
12:24:03 11 is, was there a different presentation of results in cases in
12:24:10 12 which the prosecution was eager for a DNA test than there was
12:24:17 13 in cases like this one where it was the defense clamoring for
12:24:22 14 the test. As Mr. Kulwin has made clear, she's never going to
12:24:26 15 admit that she knew who made the request for the testing, and
12:24:33 16 that is going to be a question that's going to be difficult
12:24:38 17 for us to prove; namely, her knowledge.

12:24:42 18 And Rule 404(b) is very clear that in those
12:24:45 19 circumstances in which knowledge or intent or motive or the
12:24:51 20 like is an issue, that's the kind of circumstance in which an
12:24:55 21 examination into other cases is appropriate and the evidence
12:25:02 22 from the other cases may be -- may well be admissible. So
12:25:07 23 that's precisely what we're interested in getting into.

12:25:15 24 And what we are talking about is a review, as your
12:25:20 25 Honor indicated, of what may, in fact, be a lot of paper, but

12:25:25 1 we're anticipating a paper review. They, in addition to the
12:25:32 2 State Police and Chicago crime lab records, need to go back
12:25:36 3 into case files in the clerk's office in certain instances in
12:25:41 4 order to understand a little bit more about the case. But
12:25:44 5 that's something that -- you know, that's a burden that we
12:25:48 6 would undertake as a part of our analysis and not something
12:25:52 7 for which we would need to deploy formal discovery at all.

12:25:57 8 So I really think that to a great extent, the
12:26:05 9 arguments that have been put forth a few moments ago are
12:26:08 10 strong-arm arguments that are attacking kind of a blunderbuss
12:26:14 11 approach, which is in fact not what we are up to at all.

12:26:17 12 MR. KULWIN: If I may, Judge?

12:26:18 13 THE COURT: Yes.

12:26:19 14 MR. KULWIN: Mr. Bowman has just told you that that's
12:26:25 15 basically what he wants to find out is who was asking for the
12:26:30 16 test. How do you possibly find that out without interviewing
12:26:34 17 everyone?

12:26:34 18 THE COURT: I am actually -- were I in the
12:26:45 19 plaintiff's shoes here, the first thing I would want to look
12:26:57 20 at, and it could very well stop the prosecution of the civil
12:27:08 21 case, is to take a look and see if the criminalist used
12:27:16 22 standard language or wrote the reports the exact same way,
12:27:24 23 because if the criminalist always used exactly the same
12:27:27 24 language when telling people something that they could
12:27:33 25 interpret to mean there is not enough to sample, it puts a

12:27:43 1 significant dent in my case because my assumption would be
12:27:57 2 that there would be a few cases in these circumstances where
12:28:07 3 it would be possible for me to know who was eager for the
12:28:15 4 test.

12:28:15 5 But if there is not standard language, it's a little
12:28:20 6 different for one test, one than it is another, or there's
12:28:25 7 some that stand out that are very much like the one here.

12:28:31 8 The next thing I suppose I would want to do is to
12:28:36 9 answer the question that Mr. Bowman has posed, which is, who
12:28:40 10 was eager for the test.

12:28:43 11 The problem Mr. Kulwin raises is not nearly the
12:28:50 12 question that if you go back a number of years, you're going
12:28:54 13 to have prosecutors and defense counsel who may not remember
12:28:59 14 who was eager for the test. The standard procedures by which
12:29:04 15 laboratories work is you get an initial request from the
12:29:08 16 police, and I tend not to count the police because the police,
12:29:17 17 the one element in the adversary system that is not supposed
12:29:23 18 to be adversarial, police are supposed to find out the truth.
12:29:28 19 When you get to the lawyers, you have people who are assigned
12:29:32 20 to make arguments, whatever arguments they can for whatever
12:29:36 21 side there is, whether or not it's the right side or the wrong
12:29:39 22 side. So the police make this initial request. And it's hard
12:29:46 23 to put that on the prosecutor's or the defense shoulder.

12:29:53 24 So you I think eliminate a fair number of these cases
12:29:58 25 because you may have only the initial police request, and it's

12:30:04 1 hard to say that anybody's eager for it, partly because as
12:30:12 2 scientific evidence becomes more and more known to the public,
12:30:15 3 the prosecution is under terrific pressure to ask for the
12:30:21 4 tests whenever possible. The same reason why for many years,
12:30:24 5 if a prosecutor had fingerprint evidence, they would produce
12:30:28 6 fingerprint evidence, and if they didn't, they wouldn't say a
12:30:31 7 word, until it became widely known, in which case the
12:30:35 8 prosecutor had to start putting on witnesses who told the jury
12:30:38 9 why they didn't find a fingerprint, because you had a jury who
12:30:41 10 expected that there would be fingerprints. And I suppose
12:30:49 11 there's a period of time particularly in a sexual crime where
12:30:54 12 you have a jury sitting wanting to know about the DNA.

12:30:58 13 But the fact that a prosecutor requests the DNA,
12:31:06 14 unless a prosecutor really is very concerned about something,
12:31:12 15 you can't really tell from the prosecutor's request whether
12:31:16 16 they are eager for the result. Maybe they just want it done
12:31:19 17 because they want to explain to the jury why they don't have
12:31:22 18 it.

12:31:22 19 You ordinarily can make a reasonable inference of
12:31:24 20 when the defense is interested in having the thing done
12:31:29 21 because that almost always occurs later in the case. You can
12:31:33 22 tell by the chronology that this is when the defense wanted
12:31:36 23 it. And, presumably, a criminalist who initially prepared a
12:31:44 24 report for the police might draw that inference if a request
12:31:50 25 for a DNA test comes in eight months later, that this is the

12:31:56 1 request from the defense. So in that sense, you can make sort
12:32:03 2 of a preliminary screening device. The difficulty is how
12:32:10 3 you're going to prove in any particular case, you're just
12:32:16 4 going to have to say, well, she must have known that this was
12:32:19 5 a defense test because it came in a year after she did the
12:32:22 6 first test and usually the prosecutor doesn't wait that long.
12:32:29 7 But her knowledge of who wanted the test is a dicey
12:32:35 8 proposition for you.

12:32:36 9 MR. BOWMAN: I do recognize that burden, and I must
12:32:41 10 say, and I prefer not to give away trade secrets since it's
12:32:46 11 not really our subject this afternoon, but I feel some
12:32:53 12 confidence through circumstantial evidence that we can prove
12:33:02 13 that she must have known that the request originated from the
12:33:09 14 defense in this particular case or that she more probably than
12:33:15 15 not knew because of circumstances that are reflected in the
12:33:21 16 file that I handed to you earlier and because of circumstances
12:33:25 17 that appear in the transcripts. And, you know, it may in
12:33:34 18 cases that we identify be a dicey problem. We may find some
12:33:42 19 cases in which we are relying on the timing of the request, as
12:33:45 20 the Court suggested. There may be other cases like this one
12:33:49 21 where there's stronger circumstantial evidence.

12:33:55 22 MR. KULWIN: I have to say, Judge, not to be an
12:33:59 23 alarmist, but I think we are going down a slippery evidentiary
12:34:04 24 road here because you're talking about inference upon
12:34:06 25 inference upon inference, you add up enough inferences and you

12:34:11 1 have a highly prejudicial road of evidence. I don't know what
12:34:14 2 this trade secret is, it should be out in the open, he is
12:34:17 3 counsel, he should say it, I mean summarize it.

12:34:19 4 Look, first of all, in this particular case, for
12:34:24 5 example, which does have standard criminalist language, which
12:34:29 6 is basically an inconclusive report, says no DNA profile could
12:34:35 7 be drawn. It also says, as it does here, that DNA would be
12:34:38 8 maintained on file. So right off the bat, it says that. And
12:34:43 9 I think what you're going to find that the reports generally
12:34:47 10 all say is when there is an inconclusive or when there is a
12:34:52 11 conclusive.

12:34:53 12 As to whether or not you now have to prove that it
12:34:55 13 was coming from the defense or not, it strikes me that if the
12:34:58 14 state initially requests something and it's inconclusive and
12:35:04 15 then they request again six months later, they might say try
12:35:07 16 it again because there must be. Or maybe they lose a witness.
12:35:12 17 Who knows? I don't think you can draw any inference at all
12:35:14 18 from a delay. That's first of all.

12:35:17 19 Second of all, regardless of what's being said in the
12:35:22 20 transcript Mr. Bowman references, to the extent it's not
12:35:25 21 hearsay, which sometimes it is, sometimes double and triple,
12:35:29 22 it doesn't indicate at all that Ms. Fish was privy to any of
12:35:33 23 that. She was never in court, she was never present. There
12:35:37 24 is no evidence of conferences or meetings to that extent.
12:35:42 25 That's what I don't understand.

12:35:42 1 So now we start pulling out as an initial phasing
12:35:46 2 stage all of these quote, unquote, inconclusive things, and we
12:35:50 3 look at them. And then what? The first thing that has to be
12:35:53 4 done was, before we get to anything at all, they are all going
12:35:56 5 to have to be retested, because if they are inconclusive and
12:35:59 6 they are legitimately inconclusive, then what's the relevance?
12:36:04 7 If she was right, who cares? They are inconclusive. You have
12:36:07 8 to get a forensic guy to look at every test and retest every
12:36:12 9 DNA. I am going to want that. This is inconclusive, this guy
12:36:16 10 must have been innocent or guilty. Let's find out if another
12:36:19 11 expert finds out it's inconclusive. That's step one.

12:36:23 12 Step two, if another DNA expert says, actually, there
12:36:26 13 is enough here you could have drawn something, the question
12:36:29 14 is, could you have done it in 1993 as opposed to 2009.

12:36:33 15 The third question is, let's assume you could have,
12:36:36 16 now what do we do? Let's find out did that exonerate the
12:36:40 17 defendant and let him go when he should have been convicted,
12:36:46 18 or, did it put somebody else -- did somebody get convicted on
12:36:50 19 non-DNA evidence. There is that whole thing.

12:36:55 20 Then you have to find out, you have to ascertain from
12:36:57 21 looking at all the files, was this all disclosed. Because if
12:37:01 22 it was all disclosed -- and did they do another test? Did
12:37:05 23 somebody come in and test them? I mean, it just seems to me
12:37:10 24 that since we know that's where we're going -- and then when
12:37:13 25 all of that is done, I would take the position that if you

12:37:17 1 find out of, I don't know, how many files she did in nine
12:37:21 2 years of work, 500, 700, a thousand tests, that she erred 13
12:37:28 3 times, well, yeah, I am going to want statistical testimony.
12:37:32 4 I am going to want to look at it, analyze it, and get all
12:37:35 5 sorts of things. Because it is highly prejudicial to put any
12:37:39 6 person who is wrongly convicted other than the plaintiff in
12:37:42 7 front of the jury because the jury is going to think, you know
12:37:46 8 what, strike one, strike two, strike three, which is exactly
12:37:50 9 why they want the evidence. I have been hearing this for
12:37:53 10 three years now. She has to be horrible because. She
12:37:57 11 couldn't have done this accidentally because. That's their
12:38:00 12 argument. That's the argument they've been making since I got
12:38:03 13 involved in this three years ago, and from what I gather, it's
12:38:07 14 the argument they've been making since Moriarty (phonetic) was
12:38:11 15 writing articles about this 10 years ago.

12:38:13 16 The mere fact that a criminalist errs, as you well
12:38:20 17 know, Judge, doesn't mean there is a level of intent or any
12:38:23 18 type of intent or knowledge. It may mean that the person
12:38:27 19 isn't all that good. It may mean that the person swamped with
12:38:30 20 hundreds and hundreds of requests is moving too quickly.

12:38:34 21 Or it may mean, as I saw in some transcripts, rightly
12:38:38 22 or wrongly, that the state's attorney when prepping the
12:38:42 23 witness at trial and when the judges, when she was testifying
12:38:46 24 in front of them and she would intend to elucidate, would tell
12:38:51 25 her, just answer the question. So, for example, in one case

12:38:53 1 at a preliminary hearing, she completely excluded the
12:38:56 2 defendant after a mild cross-examination, and at the trial,
12:39:01 3 the defense attorney, for reasons unknown to me, asked none of
12:39:05 4 the same questions, she wasn't asked any of them, and a
12:39:07 5 different conclusion was reached. There's just a whole
12:39:14 6 variety of things.

12:39:15 7 I am not -- I am just saying I know that if I was the
12:39:20 8 plaintiff, yeah, I would love, I would give anything, to have
12:39:22 9 in front of this jury that others that Ms. Fish examined were
12:39:28 10 wrongfully imprisoned. Why? Who cares? Once the jury hears
12:39:34 11 that, it is game, set, and match for the plaintiff, in my
12:39:38 12 opinion. I don't think that's an exaggeration. And if they
12:39:41 13 hear about it twice, they are not going to make five niceties
12:39:44 14 about, well, does it prove knowledge, does it prove intent,
12:39:48 15 does it prove motive?

12:39:49 16 So it's very highly prejudicial evidence, and if we
12:39:53 17 are going to be able to do it, then the defense has to be able
12:39:55 18 to make a strong and lengthy counter-presentation about the
12:39:59 19 nature of each one of these --

12:40:01 20 THE COURT: I wouldn't worry about that. That's what
12:40:03 21 I started with.

12:40:04 22 MR. KULWIN: But I don't want to -- my view of it is
12:40:08 23 it's expensive and it's lengthy.

12:40:10 24 THE COURT: The problem with this case, like the
12:40:27 25 problem of citing other district judges who have allowed or

12:40:31 1 refused discovery and discovery briefs, the problem with this
12:40:39 2 case is it is the same problem as citations is volume,
12:40:47 3 enormous volume, and there is no proposition on which -- with
12:40:51 4 respect to discovery. I wagered this. I have no scientific
12:40:55 5 basis. But I wager there is no discovery issue addressed by a
12:41:01 6 district judge sitting alone and reporting F.Supp. and FRE on
12:41:07 7 any issue in which you cannot find at least two district
12:41:11 8 judges, two opinions on each side. And the finicky thing is
12:41:19 9 when lawyers quote that to you, they never quote the details.
12:41:24 10 They always quote the language, the preparatory language about
12:41:30 11 the great need for discovery and on the other side pointless
12:41:34 12 and expensive fishing expeditions. You see those over and
12:41:39 13 over and over again.

12:41:41 14 MR. KULWIN: That way you're disappointed.

12:41:46 15 THE COURT: It's okay. I come to expect it.

12:41:49 16 What I have here is Mr. Bowman's argument that this
12:41:58 17 discovery could help him. I think he's fairly careful to say
12:42:04 18 that he doesn't know that it will help him. And your argument
12:42:11 19 is if you look at the dynamics of it, it probably won't help
12:42:15 20 him.

12:42:18 21 From my perspective, I don't really want to sit here
12:42:27 22 and guess, to some extent as both of you are doing, what's
12:42:31 23 behind the curtain. I don't criticize you for this. It's
12:42:34 24 what lawyers do in discovery. They give their best guess as
12:42:40 25 to what's going to occur. I am willing to test it. And the

12:42:44 1 reason I am willing to test it is you don't have to do, what
12:42:52 2 is it, nine years, ten years, whatever it is. You don't need
12:42:56 3 to do all nine or ten years. You can pick a year or two.
12:42:59 4 Take a look at what you've got, come to me, and somebody will
12:43:05 5 say, see, I was right, or what may also be likely is both of
12:43:10 6 you will come to me and see, I was right.

12:43:15 7 So I am proposing two years, and I am proposing that
12:43:24 8 the two years of the entire period not be consecutive years.
12:43:34 9 There could be an argument that you don't need a full year,
12:43:38 10 six months of a year would work. That would be fine with me
12:43:43 11 too. Because it is going to be expensive, and the plaintiff
12:43:51 12 is going to have to bear a lot of that expense, time, and
12:43:56 13 effort.

12:43:58 14 With respect to what would happen if they find other
12:44:08 15 errors and you've got wrongful convictions, they would face
12:44:18 16 some barrier in getting that evidence in because they couldn't
12:44:23 17 get it in simply because some test was not done, the proper
12:44:30 18 test was not done, or what was done was not properly reported,
12:44:36 19 unless they can show, in a fairly direct way, causation.

12:44:42 20 One of the difficulties with trying to get the
12:44:46 21 evidence gatherer and evidence analyst and making them
12:44:52 22 responsible for any wrong result in any court case is that
12:45:00 23 there's so many intervening factors in the causation analysis.
12:45:06 24 You've got bad defense lawyers, you've got ruthless
12:45:11 25 prosecutors, you've got judges who make errors in the course

12:45:16 1 of the case. There are lots of reasons why somebody might be
12:45:22 2 wrongfully convicted, and you can't really put the causation
12:45:28 3 on the -- and I am talking -- I'm assuming for this purpose
12:45:32 4 that there is absolute evidence of exoneration. I'm assuming
12:45:37 5 that is the case.

12:45:38 6 It's still difficult to prove that this particular
12:45:42 7 test result is the cause of it. And one of the reasons is is
12:45:47 8 that criminalists do not operate on the same standards, for
12:45:50 9 example, as a hospital pathology lab, because what follows the
12:45:55 10 result of a pathology analysis, or even a DNA analysis,
12:46:04 11 because they do that for some forms of medical treatment, is
12:46:07 12 there is no adversary process that follows it. You know,
12:46:11 13 nobody comes in and says there's some other doctor. Well, get
12:46:15 14 your own expert, see if the pathology is a little different.
12:46:18 15 The weight that's put on medical use of test results is much,
12:46:23 16 much heavier than that in adversary systems.

12:46:34 17 So there is a long road between that. And it's I
12:46:38 18 think worth doing. And in inferring from what you have said
12:46:44 19 and what Mr. Bowman has said, that in the long course of
12:46:47 20 litigation involving this particular criminalist, this
12:46:51 21 particular sort of analysis has not been done; is that right?

12:46:56 22 MR. BOWMAN: It is.

12:46:57 23 MR. KULWIN: I don't think it's been done in the
12:46:58 24 context of any particular case. I don't know. I'd have to
12:47:01 25 yield to Mr. Timbo or the City to find out whether they did an

12:47:04 1 audit of all her files in the past. If I can find that out,
12:47:10 2 or Mr. Timbo, I don't know.

12:47:12 3 THE COURT: And whatever they did might be helpful,
12:47:15 4 but it won't be looked at in the same way that Mr. Bowman
12:47:20 5 looked at.

12:47:20 6 So you can discuss with each other what you regard as
12:47:25 7 an appropriate sampling process, and we will see where we go
12:47:31 8 from there.

12:47:32 9 MR. KULWIN: I would just raise a couple of
12:47:34 10 questions, Judge, if I could.

12:47:35 11 THE COURT: Sure.

12:47:35 12 MR. KULWIN: The first question is I assume that
12:47:38 13 whatever this appropriate sample that we are talking about is
12:47:42 14 limited to DNA tests that are inconclusive at this point.

12:47:46 15 THE COURT: We are doing DNA tests. We are not doing
12:47:51 16 -- no other chemistries.

12:47:53 17 MR. KULWIN: And it's just ones where it was
12:47:55 18 inconclusive, is that my other further understanding?

12:47:58 19 THE COURT: The truth of the matter is you are going
12:48:00 20 to have to look at a fair number of them. The ones that they
12:48:04 21 are going to be particularly interested in are the
12:48:07 22 inconclusive ones.

12:48:08 23 This is not the kind of case -- I mean, one of the
12:48:12 24 threshold issues that this plaintiff has to face is that if
12:48:18 25 you want to portray a picture of a ruthless criminalist who is

12:48:28 1 determined to put this guy in jail because she doesn't like
12:48:38 2 his taste in clothing, which of course she would not have
12:48:42 3 known, they can't get anywhere with that because the material
12:48:46 4 was preserved and not destroyed. They're looking basically
12:48:51 5 for something that looks a little like either reckless
12:48:57 6 behavior or behavior that was designed to help out the team.

12:49:07 7 MR. KULWIN: So they get to look at two years of DNA
12:49:10 8 to be randomly selected --

12:49:12 9 THE COURT: Well, what's going to happen, you are
12:49:14 10 going to select two years, and it's not going to be a random
12:49:18 11 selection. And I am perfectly willing to let each side pick
12:49:22 12 one period. But I don't think that that's absolutely
12:49:25 13 necessary. The only burden I am imposing -- the only
12:49:29 14 condition I am imposing is not two consecutive periods. And
12:49:37 15 you'll go through them, and you will have some kind of idea.

12:49:41 16 And the other thing is given the difficulty that is
12:49:44 17 inherent in this case against this defendant, the sooner
12:49:51 18 Mr. Bowman knows that he has or does not have a chance, the
12:49:54 19 better it is for everybody. Okay?

12:50:00 20 Do I have another status set for this?

12:50:02 21 MR. BOWMAN: We don't.

12:50:04 22 THE COURT: Second week of February. And then tell
12:50:07 23 me what my parting remarks have led to.

12:50:15 24 MR. BOWMAN: Sounds good.

12:50:17 25 THE CLERK: February 10th at 10:00 a.m.

12:50:22 1 MR. KULWIN: Thanks, Judge.

12:50:24 2 THE COURT: Thanks, Counsel.

12:50:25 3 MR. BOWMAN: Thanks, Judge.

12:50:25 4 MS. PARLING: Thank you, your Honor.

5 (Which were all the proceedings had in the above-entitled
6 cause on the day and date aforesaid.)

7 I certify that the foregoing is a correct transcript from
8 the record of proceedings in the above-entitled matter.

9 _____
Carolyn R. Cox
10 Official Court Reporter
Northern District of Illinois

Date

11 /s/Carolyn R. Cox, CSR, RPR, CRR, FCRR

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